Foo Hong Ling & Ors v Metroplex Project Management Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S1–24–241 OF 2005
KANG HWEE GEE J
12 JULY 2006

Contract — Breach — Performance of contract — Developer failed to hand over vacant possession within 36 months of the execution of the SPA — Architect's certificate certifying apartments were duly completed — Whether amounts to delivery of vacant possession — Whether pre conditions required under architect's certificate had been fulfilled

The plaintiffs are purchasers of apartments developed by the defendant vide sale and purchase agreements ('SPAs') dated 12 October 1994 and 24 July 1995. Pursuant to cl 22 of the SPAs, failure to deliver vacant possession of the apartments within 36 months of the execution of the SPAs that is to say by 11 October 1997 and 23 July 1998, the defendant shall immediately pay the plaintiffs liquidated damages (LAD) to be calculated from day to day at the rate of 10% per annum of the purchase price. Pursuant to cl 24 of the SPAs, failure to deliver the common facilities serving the housing development, the defendant shall immediately pay the plaintiffs LAD to be calculated from day to day at the rate of 10% per annum of the last 20% of the purchase price. Under cl 23 of the SPAs, the defendant was to deliver vacant possession upon: (i) the issuance of a certificate by its architect certifying that the construction of the properties have been duly completed; (ii) water and electricity are ready for connection; and (iii) the defendant has applied for the certificate of fitness of occupation (CF). The defendant claims by its opposing affidavit that it has complied with cl 23 of the SPA by the aforesaid certificate of its architect.

Held:

(1) Having read the architect's certificate dated 30 March 1995, it is clear that the certificate is only a progress report certifying that the apartments were duly completed without certifying that the water and electricity supplies were ready for connection and there is no evidence of the defendant having made the application for the CF (see para 12).

(2) The defendant had not indicated in its affidavit exactly when the pre-conditions required under its architect's certificate had been fulfilled. It must then be assumed that all the three conditions above had only been fulfilled and thereby allowing the architect to issue a proper certification under cl 23 of the SPA on the date when the CF was issued. Thus, vacant possession had not been delivered by the issuance of the architect's certificate on 30 March 1995 (see para 13).

(3) The defendant must therefore pay the first and second plaintiffs LAD in the sum of RM108,577.97 and the third and fourth plaintiffs LAD in the sum of RM97,409.46 calculated from 36 months from the date of the execution of the SPAs to the date of the CF on 12 August 2002 pursuant to cll 22 and 24 of the SPAs with interest and costs (see para 19).

[Bahasa Malaysia summary

Plaintif-plaintif adalah pembeli pangsapuri-pangsapuri yang dimajukan oleh defendan melalui perjanjian jual beli ('PJB tersebut') bertarikh 12 Oktober 1994 dan 24 Julai 1995. Melalui kl 22 PJB tersebut, kegagalan menyerahkan milikan kosong pangsapuri-pangsapuri tersebut dalam masa 36 bulan dari PJB tersebut dilaksanakan iaitu sebelum 11 Oktober 1997 dan 23 Julai 1998, defendan akan dengan serta merta membayar kepada plaintif ganti rugi jumlah tertentu (ganti rugi tersebut) pada kadar 10% setahun daripada harga belian dikira dari hari ke hari. Melalui kl 24 PJB tersebut, kegagalan menyerahkan kemudahan kegunaan umum di pemajuan perumahan, defendan akan dengan serta merta membayar kepada plaintif ganti rugi jumlah tertentu (ganti rugi tersebut) dikira dari hari ke hari pada kadar 10% daripada jumlah belian 20% yang terakhir. Melalui kl 23 PJB, defendan dikehendaki menyerahkan milikan kosong selepas: (i) pengeluaran sijil oleh arkiteknya mengesahkan bahawa pembinaan bangunan tersebut telah disiapkan; (ii) air dan bekalan elektrik bersedia untuk disambungkan; dan (iii) defendan telah memohon untuk sijil penghunian (SP tersebut). Defendan mendakwa melalui afidavitnya bahawa ia telah mematuhi kl 23 PJB tersebut melalui sijil arkitek.

Diputuskan:

(1) Setelah membaca sijil arkitek bertarikh 30 Mac 1995, adalah jelas bahawa sijil tersebut hanya merupakan satu laporan perkembangan mengesahkan pangsapuri-pangsapuri tersebut telah disiapkan tanpa mengesahkan bahawa air dan bekalan elektrik sedia untuk disambungkan dan tiada bukti defendan memohon untuk SP tersebut (lihat perenggan 12).

(2) Defendan tidak menunjukkan di dalam afidavitnya bila sebenarnya pra-syarat seperti yang dikehendaki di bawah sijil arkitek telah ditunaikan. Ia mesti dianggap bahawa kesemua tiga syarat-syarat di atas telah ditunaikan dan dengan itu membenarkan arkitek mengeluarkan sijil yang sewajarnya di bawah kl 23 PJB tersebut pada tarikh di mana SP tersebut dikeluarkan. Dengan itu milikan kosong belum lagi diserahkan dengan pengeluaran sijil arkitek pada 30 Mac 1995 (lihat perenggan 13).

(3) Defendan dengan itu mesti membayar plaintif pertama dan kedua ganti rugi tersebut berjumlah RM108,577.97 dan plaintif ketiga dan keempat ganti rugi tersebut berjumlah RM97,409.46 dikira dari 36 bulan dari tarikh perlaksanaan PJB ke tarikh SP tersebut pada 12 Ogos 2002 mengikut klausa-klausa 22 dan 24 PJB dengan faedah dan kos (lihat perenggan 19).]

Notes

For cases on breach of performance of contract, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2346–2350.

Legislation referred to
Companies Act 1965 s 176(10)

Harwinder Singh (AJ Ariffin Yeo & Harpal) for the plaintiffs.
Geetha Santhira Thesan (William Leong & Co) for the deefndant.

Kang Hwee Gee J:

[1] This is my oral judgment:

[2] Enclosure 1 (originating summons) is an application by the plaintiffs/purchasers of apartments developed by the defendant/vendor/developer vide sale and purchase agreements ('SPAs') dated 12 October 1994 and 24 July 1995.

[3] In cl 22(1) of the SPAs, the defendant was obliged to deliver vacant possession of the apartments within 36 months of the execution of the SPAs that is to say by 11 October 1997 and 23 July 1998 respectively.

[4] In cl 22(2) of the SPAs, in the event the defendant fails to deliver vacant possession within the 36 month period, the defendant shall immediately pay to the Plaintiffs liquidated damages (LAD) to be calculated from day to day at the rate of 10%pa of the purchase price.

[5] In cl 24(1) of the SPAs, the defendant was obliged to deliver the common facilities serving the housing development on which the Plaintiffs' apartments are constructed within 36 months of the execution of the SPAs.

[6] In cl 24(2) of the SPAs, in the event the defendant fails to deliver vacant possession on time, the defendant shall immediately pay to the Plaintiffs LAD to be calculated from day to day at the rate of 10% per annum of the last 20% of the purchase price.

[7] Under cl 23 of the SPAs, the manner of delivery of vacant possession is described as follows:

(i) Upon the issuance of a certificate by the vendor's architect certifying that the construction of the said parcel has been duly completed and water and electricity supply are ready for connection to the said parcel and the vendor has applied for the issuance of the certificate of fitness for occupation (CF) from the appropriate authority and the purchaser having paid all monies payable under cl 4(1) in accordance with the Third Schedule and all other monies due under this agreement and the purchaser having performed and observed all the terms and covenants on his part under this agreement, the vendor shall let the purchaser into possession of the said parcel:

PROVIDED THAT such possession shall not give the purchaser the right to occupy and the Purchaser shall not occupy the said parcel until such time as the certificate of fitness for occupation for the said building is issued.

(i) the issuance of a certificate by its architect certifying that the construction of the properties have been duly completed; and

(ii) water and electricity are ready for connection; and

(iii) the defendant has applied for the CF.

It is clear that under cl 23 of the SPAs, the defendant was to deliver vacant possession upon:-

[8] The defendant had on 3 April 1995 delivered to the 1st and 2nd Plaintiffs, and on 15-9-1995 to the third and fourth plaintiffs its architect's certificate dated 30 March 1995 which read as follows:

PROGRESS REPORT	—	NO. 31
TYPE	—	13 STOREY APARTMENT (AYER BLOCK)
PHASE	—	TAMAN KOSAS

STAGE	DESCR-IPTION	%	BLOCK	FLOOR	LOT NO.
3	The construction of the said building has been duly completed	15	AYER		AY 2/1 TO AY 13/140

[9] The defendant claims by its opposing affidavit that it has complied with cl 23 of the SPA by the aforesaid certificate of its architect.

[10] Having read the architect's certificate dated 30 March 1995, it is clear that the certificate is only a progress report certifying that the apartments were duly completed without certifying that the water and electricity supplies were ready for connection and there is no evidence of the defendant having made the application for the CF.

[11] The defendant has not indicated in its affidavit exactly when the pre conditions required under its architect's certificate had been fulfilled.

[12] It must then be assumed that all the three conditions above had only been fulfilled and thereby allowing the architect to issue a proper certification under cl 23 of the SPA on the date when the CF was issued.

[13] I must accordingly so find that vacant possession had not been delivered by the issuance of the architect's certificate on 30 March 1995.

[14] In its affidavit opposing this application, the defendant had raised the issue that the plaintiffs delayed in making this application for late delivery.

[15] This is of no consequence as the claim has been made within the limitation period after the CF had been issued on 12 August 2002.

[16] Furthermore, there was a 'elf imposed' restraining order under s 176(10) of the Companies Act 1965 which prevented the plaintiffs from commencing any legal proceedings against it for a period of two years from the date of the restraining order on 22 October 2002.

[17] The defendant must therefore pay the first and second plaintiffs LAD in the sum of RM108,577.97 and the third and fourth plaintiffs LAD in the sum of RM97,409.46 calculated from 36 months from the date of the execution of the SPAs to the date of the CF on 12 August 2002 pursuant to cll 22 and 24 of the SPAs with interest and costs.

Order accordingly.

Reported by Sally Kee